The potential for sustained conflict is an integral part of every aspect of human interaction. Since the dawn of civilization seemingly minor disagreements have blossomed into major disputes for a broad range of reasons too numerous to catalog. But whatever the cause of the conflict, all battles start where attempts to find common ground give way to the perceived need to use force as the means to further self-interest.

The ultimate expression of will through the use of force traces a complementary and intertwined path throughout history with precursive efforts at conciliation through the use of statecraft. From the earliest efforts to collaborate with others to provide food and shelter, to current protocols that delineate the highest arts of international diplomacy, the drive exists in an organized society to find ways to manage the nature and extent of conflict in a manner that minimizes the disruption and depletion of resources resulting from the use of force. Partly in recognition of the need to develop a philosophical approach that facilitates this effort, the ability to consolidate power and manage the allocation of resources through strength of arms becomes an incorporeal right denied to all but the government. Under this philosophy, possession no longer is nine tenths of the law.
In order to manage the nature of conflict in a manner that will not threaten the government’s monopoly on the right to use its police and military power to resolve disputes, alternative political systems are developed to satisfy a society’s quest for balance and to dispense justice. Chief among these alternatives, where the disputes involve commercial or property rights and obligations, is an open and independent judiciary. However, even the most independent judicial system is still *per se* a branch of government. Between private members of society, whether individuals or large corporate entities, negotiated resolution of disputes in a business setting remains the preferred method of dispute resolution, with submission to the vicissitudes of the judicial system seen as a means of last resort for addressing everything short of severely abusive or anticompetitive business conduct.

Due to the limitations of even the best judicial system, both in terms of the delays and the expense of having a dispute resolved by the courts, lawsuits typically are brought only when at least one side has firmly concluded that further negotiations, and the finer points of business diplomacy, simply will not resolve the impasse. In these situations, when all reasonable attempts at statecraft have failed, business hawks feel especially free to use the legal process as a vehicle through which they can attack and attempt to destroy the opposing side. To that end, with the era long passed where armed conflict or self-help constituted viable options to further individual business interests, aggressive litigation increasingly is used by individuals and corporate interests alike as the military arm of business diplomacy.

In this setting trial lawyers emerge as modern champions who will engage in battle on behalf of their client. As much as trial lawyers as a group are generally disliked by a populace unhappy when power is wielded by others, they have gained an elevated position of power and influence in the United States by reason of the complexities of the judicial system and the importance of knowing how to “wage war” in our increasingly litigious society.

To become one of the elite members of the trial bar, a lawyer must master the process of trying a case to a jury – the ability to first marshal
the relevant facts, then decide on the applicable legal theories, and finally
to present the arguments in a cogent and compelling fashion. Developing
these skills requires specialized training, years of hard work and unflinching
dedication. However, the skills developed by trial lawyers in order to achieve
success in the battles they undertake on behalf of their clients requires more
than mere knowledge of legal principles relating to evidence and procedure.
Many of the principles discussed in this book also derive their application
from observations of how people react in common business settings as
well as in the courtroom. Fortunately for the trial lawyer, over the course
of an active career many opportunities exist to observe and interact with
those who represent a wide spectrum of human behavior. Great advocates
have in common their interest in people: What they think and how life’s
experiences will shape their decisions.

Techniques born from an understanding how to interact with others,
and how others will react to an argument or plea, is thus equally important
as substantive knowledge. But mere knowledge of any given technique,
when not tempered by honor or an awareness of the rights of others, can
create undesirable outcomes.

As success for the trial lawyer is often measured by the number of
victories achieved, to a client the ability of counsel to prevail at any cost
has become a highly prized characteristic. With the stakes substantial and
the competition fierce to handle highly compensated bet the company
litigation, the highly touted ability of the trial lawyer to remain objective
and independent is constantly challenged. For the truly successful trial
lawyer, however, the temptation to win at any cost is avoided by adhering to
unwritten codes of professional conduct that values long term honor over
short term victory. The most successful trial lawyers also know that time
presents opportunities, but only when considered in light of what has been
learned from the past. They must be open to looking at problems from
many angles, including from the viewpoint of their opponent, as problems
that appear insoluble when considered from one perspective may have
several solutions when considered from another.
The strategies, tactics and techniques employed in pursuit of the ideals that raise a good trial lawyer to continued success are not, however, useful only in contests between members of the legal profession. Without exception, application of the interactive skills and ethical codes that trial tested warriors bring to their presentations and style of negotiations inside and out of the courtroom are equally useful to the business person as a means of achieving success in the boardroom long before the call to war is sounded. Indeed, the best trial lawyers, the “lions of the courtroom,” achieve success not merely for their ability to wield a judicial sword. Rather, highly developed negotiating skills are an essential complement to knowledge of the law as opportunities to resolve disputes are as likely to appear in the midst of battle as before the first blow is struck. Because such opportunities rarely come with advance warning, and most disputes have more potential for resolution by way of a negotiated business agreement outside of the courtroom rather than as a result of a verdict rendered after the close of the proceedings, a trial lawyer’s highest value often comes more from having developed the philosophical approach to litigation that views the process of doing battle as merely one aspect of business diplomacy.

This philosophical view of litigation as the military arm of business diplomacy embraces the practical ability to shape the ultimate outcome of a business dispute through the use of all manner of litigation strategies, negotiating tactics as well as a variety of presentation techniques. Through this work a number of philosophical underpinnings of the mechanics of civil litigation are identified, with illustrative examples of how knowledge and understanding of strategic and tactical concepts developed in the courtroom can be applied in a variety of business situations.

The observations that follow are intended to provoke consideration of the manner in which different strategies and tactics could be deployed in an appropriate situation rather than provide an exhaustive dissertation on any particular point. While each of the subjects discussed in the following chapters are focused on specific concepts, the value of experience over time is what fully advises when they should be used, in what combination, or
not at all. Understanding the manner in which these skills can be applied, tempered by an appreciation of the philosophical observations that lessen the likelihood of inappropriate deployment, increases the potential for a path to success that may avoid the need to beat the drums of war.